STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2008
v	No. 272776 Wayne Circuit Court
ANTOINE DASHAWN JACKSON, Defendant-Appellant.	LC No. 06-004554-01

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for arson of a dwelling house, MCL 750.72. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 7 to 20 years' imprisonment. We affirm.

Defendant first asserts that the trial court erred in admitting expert testimony regarding the cause and origin of the fire because the testimony did not meet the requirements of MRE 702. "The decision to admit or deny expert testimony falls within the sound discretion of the trial court and will not be reversed absent a clear abuse of that discretion." *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992).

MRE 702 governs the admission of expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The trial court, in exercising its role as gatekeeper, has an obligation "to ensure that any expert testimony admitted at trial is reliable." *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007) (citation omitted).

Defendant was charged with intentionally setting fire to the apartment of his girlfriend, Carrie Wilkinson, with whom he lived, at least on a part-time basis. The trial court properly

concluded that the testimony of the prosecution's expert, city of Taylor Fire Marshal John Hager, explaining the cause and origin of the fire, would assist the jury in understanding the evidence. Hager is a fire marshal who has undergone significant training in fire investigation, has 15 years of experience in the field of fire fighting and is certified as a fire investigator. Hager has investigated more than 150 fires and was previously qualified as an expert witness in fire investigation. As such, Hager had sufficient experience, training, and education to qualify as an expert regarding the cause and origin of fires pursuant to MRE 702.

Hager testified regarding the manner in which a fire spreads; abnormal burn patterns and what they signify, and the way in which fire damage can be assessed to determine the cause and origin of a fire. Hager opined that the abnormal burn patterns on the floor of Wilkinson's apartment were highly suggestive of the presence of an accelerant. He further indicated that the fact that a burner on the stove was left on, with no cookware on or around the stove, caused him to believe that the burner was left on intentionally to act as an additional accelerant. Hager maintained that he based his fire investigation methodology on the National Fire Protection Association 921 (NFPA 921), a nationally recognized guideline for fire investigation. Contrary to defendant's assertion, the fact that the investigative method Hager implemented is not a carbon copy of the NFPA 921 and is not peer-reviewed does not suggest that his methodology deviated from recognized fire investigation procedures in a sufficiently significant manner to render his findings unreliable. Hager's methodology appeared reasonable and was by and large in keeping with the guidelines recommended by NFPA 921. Where Hager deviated from NFPA 921, such deviation is not dispositive because NFPA 921 expressly provides that it contains only nonmandatory provisions; it merely sets guidelines and recommendations for fire investigations, not requirements.[1] Further, contrary to defendant's contention, NFPA 921 § 1.3 specifically indicates, "[d]eviations from these procedures, however, are not necessarily wrong or inferior but need to be justified." Hager's theory that the fire was intentionally set with an accelerant is based on sufficient evidence that Hager reasonably applied to recognized and reliable fire investigation principles and methods based on NFPA 921. Although Hager's testimony was vulnerable to criticism because it was contrary to laboratory results indicating the absence of an accelerant, this discrepancy did not render it inadmissible. Such criticisms go to the weight rather than the admissibility of the testimony. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Accordingly, because Hager's expert testimony met the requirements of MRE 702, it was properly admitted.

Defendant also asserts that the trial court erred in admitting testimony concerning canine accelerant detection. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). However, this Court reviews defendant's unpreserved claim of evidentiary error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred; (2) the error was plain, i.e., clear or obvious; (3) and the plain error affected substantial rights." *Id.* at 763.

[1] NFPA 921 §§ 1.2.1, 1.3 and 3.2.

Defendant contends that the admissibility of canine-detection evidence is improper if it is not substantiated by scientific evidence. Specifically, defendant argues that the absence of any forensic evidence verifying the presence of accelerants should have precluded testimony regarding the canine alert. Testimony concerning a trained canine's positive identification of an incriminating substance has consistently been deemed admissible for many years in Michigan if certain criteria are met. *People v Perryman*, 89 Mich App 516, 520-521; 280 NW2d 479 (1979). See also *People v Williams*, 472 Mich 308, 311; 696 NW2d 636 (2005); *People v Clark*, 220 Mich App 240, 244; 559 NW2d 78 (1996). In order to establish the necessary foundation to admit tracking-dog evidence, the prosecution must demonstrate that the handler was qualified to use the canine, that the canine was trained and accurate in tracking, the canine was placed in the location where the alleged guilty party was believed to have been and that the trail to be worked by the canine had not become so stale or contaminated that it was beyond the competency of the canine to follow it. *People v Laidlaw*, 169 Mich App 84, 93; 425 NW2d 738 (1988), citing *People v Harper*, 43 Mich App 500, 508; 204 NW2d 263 (1972).

At trial, Captain Raymond Wlosinski of the Garden City Fire Department testified that his accelerant-detecting canine had been trained to alert to the presence of accelerant by sitting in the area of the accelerant and making eye contact with her handler. Wlosinski explained that the canine had undergone many hours of training in the detection of accelerants and was formally certified in accelerant detection. Wlosinski testified that his canine alerted to the presence of accelerant on the floor of Wilkinson's apartment in the vicinity of a table situated near the living room couch. However, this testimony was contrary to Wlosinski's written report indicating the canine did not demonstrate behaviors signifying an alert to the presence of an accelerant in any areas in the apartment.

Defendant's assertion that scientific evidence is necessary to substantiate canine-detection evidence is overly broad and misrepresents the current status of the law in this State. Although there exists a "rule that tracking dog evidence, standing alone, is insufficient to support a conviction," the presence of "corroborating evidence" provides the necessary indicia of reliability for the admission of such evidence. *People v McPherson*, 85 Mich App 341, 346; 271 NW2d 228 (1978). Corroborating evidence existed, supporting the admission of the canine evidence, based on the fire inspector's determinations and observations in the apartment regarding the use of an accelerant. Further, a determination regarding the presence of an accelerant is not dispositive of whether the fire originating in the apartment was attributable to arson. Consequently, the inconsistency between the canine-handler's verbal report of his dog's response in the apartment and the absence of forensic evidence verifying the existence of an accelerant is irrelevant as other, corroborative, evidence implicating arson was admitted, including but not necessarily limited to the absence of any electrical or other cause to explain the fire, defendant's previous threats coupled with his access and presence in the apartment immediately before detection of the fire.

Furthermore, even if admission of the canine testimony was improper, defendant had failed to establish outcome-determinative error in light of all of the evidence against him. The night before the fire, defendant and Wilkinson argued and Wilkinson left the apartment and did not return. During the next 24 hours, defendant doggedly pursued Wilkinson, calling various people in an effort to find her, telling his friend that Wilkinson was sleeping with another man and asking his friend for a gun so he can "kill my bitch," and ramming his car into Wilkinson's

mother's car while she was is in her mother's house. Wilkinson testified that defendant had previously threatened to burn down her apartment. Approximately two hours after defendant left the apartment the fire was detected. Defendant was the only person other than Wilkinson with a key to the apartment, and he was the last and only person seen leaving the apartment before the fire. Hager's investigation revealed that one of the gas burners on the stove was left on, contributing to the fire. As a result, even without the canine detection testimony, there was sufficient evidence to convict defendant of arson.

Defendant next argues that the prosecutor engaged in misconduct that denied him a fair and impartial trial. Specifically, defendant asserts that the testimony of Wlosinski that his canine did alert to accelerants or areas of interest in the apartment must have been false given the absence of any such finding in his written report. In addition, defendant references contradictions in the testimony of Hager and Wilkinson regarding whether Wilkinson had informed him of electrical problems in the apartment. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, this Court reviews defendant's unpreserved claims of prosecutorial misconduct for plain error affecting his substantial rights. *Carines, supra* at 762-763.

Prosecutors have a constitutional duty to not "knowingly use false testimony to obtain a conviction," and a "duty to correct false evidence." *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). The mere fact that a witness's testimony conflicts with other evidence does not establish that a prosecutor knowingly presented perjured testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Importantly, as part of his investigation, Hager checked the electrical system in the apartment and determined it was not a factor in the origin of the fire. Consequently, any discrepancy in testimony regarding whether Wilkinson informed Hager of electrical problems that had occurred before the fire are irrelevant, or at most raise issues of credibility for the jury to address. Wlosinski testified that his omission of the dog's reaction to the presence of an accelerant in the apartment in his report was accidental. This comprised merely a matter of credibility for determination by the jury and not proof or implication of prosecutorial misconduct.

Defendant also contends that the prosecutor acted improperly by withholding exculpatory evidence. Specifically, defendant contends the prosecution withheld potentially exculpatory forensic evidence regarding the absence of an accelerant on his shoes. Due process requires that a criminal defendant have access to certain information that the prosecutor possesses. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable possibility exists that the outcome of the proceedings would have been different." *People v Fox* (*After Remand*), 232 Mich App 541, 549; 591 NW2d 384 (1998).

The jury heard testimony from Hager that samples of Wilkinson's carpet and couch tested negative for accelerants. During a pretrial hearing held a few days before trial, the trial court asked the prosecutor: "[w]hat exactly is the Michigan State Police analyzing or investigating at their lab?" The prosecution responded, "I believe it's carpet samples, maybe

even couch samples." While there was an implication that defendant's shoes were also sent to evaluate for the presence of accelerants, it is not clear that samples of defendant's shoes were actually forwarded to the laboratory for testing. Consequently, defendant's assertion of wrongful conduct is completely speculative. Even assuming that the prosecutor possessed evidence favorable to defendant and withheld it, defendant cannot establish outcome-determinative prejudice. The jury was already aware that the carpet and couch tested negative for accelerants. Hence, the existence of additional evidence, which tested negatively for an accelerant, is merely cumulative. In light of the evidence against defendant, it is not reasonably probable that the outcome of the proceedings would have been different had the jury been aware that samples from defendant's shoes also tested negative for accelerants. Therefore, defendant's prosecutorial misconduct claim is unsubstantiated.

Next, defendant argues that the trial court abused its discretion in assessing 25 points for Prior Record Variable (PRV) 1 and 15 points for Offense Variable (OV) 2. This Court reviews a trial court's scoring decision for an abuse of discretion to determine whether the "evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Endres* (*After Remand*), 269 Mich App 414, 417; 711 NW2d 398 (2006). "Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence." *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991).

PRV 1 is scored when a defendant has a prior high severity felony conviction. Defendant was assigned 25 points for PRV 1 because he had a prior high severity felony conviction pursuant to MCL 777.51(2). The conviction relied on by the sentencing court was for second-degree felony home invasion, MCL 750.110a, to which defendant pleaded guilty on April 17, 1995, with discharge from probation for this offense in April 1997. Specifically, defendant asserts error in the use of this prior conviction for assignment of points under PRV 1 based on his participation in the Holmes Youthful Trainee Act (HYTA), MCL 762.11. MCL 762.14(2) provides that "[a]n assignment of an individual to the status of youthful trainee . . . is not a conviction for a crime." However, MCL 762.14(4) provides:

> Unless the court enters a judgment of conviction against the individual for the criminal offense under section 12 of this chapter, all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection, *but* shall be open to the courts of this state, the department of corrections, the family independence agency, law enforcement personnel and, beginning January 1, 2005, prosecuting attorneys for use in the performance of their duties. [Emphasis added.]

In addition, the sentencing guidelines specifically define a "conviction" as including "[a]ssignment to youthful trainee status . . . ." MCL 777.50(4)(a)(*i*).[2] "When a statute

[2] The restriction contained in MCL 777.50(1) precluding the "use [of] any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication" is not violated by the trial court's use of this conviction
(continued…)

specifically defines a given term, that definition alone controls." *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). Therefore, given the existence of defendant's acknowledged prior felony conviction and the propriety of its consideration for purposes of scoring of PRV 1, the trial court did not abuse its discretion in assessing 25 points for this variable.

Next, OV 2 is scored for the lethal potential of the weapon possessed or used. Defendant received 15 points for OV 2 because he possessed or used an incendiary device pursuant to MCL 777.32(1)(b). In assessing the 15 points, the trial court noted that Hager's testimony and "other circumstantial evidence" supported a finding that defendant used an incendiary device to start the fire. In addition to the suspicious burn patterns that signified the presence of an accelerant, the gas emitting from the burner on the stove could be considered an additional incendiary device. The circumstances surrounding the fire support the trial court's decision to assess 15 points for OV 2 and, therefore, did not constitute an abuse of discretion.

Finally, defendant argues that his counsel was ineffective. The determination whether a defendant has been deprived of the effective assistance of counsel presents "a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). "[C]ounsel's performance must be measured against an objective standard of reasonableness" and without "the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

As noted *supra*, Hager's testimony was based on sufficient facts and reliable methodology concerning fire investigation. Even assuming that counsel erred by engaging in insufficient cross-examination of Hager, either at the *Daubert*[3] hearing or at trial, concerning his methodological deviations from NFPA 921, defendant cannot establish outcome-determinative prejudice. It was established at the *Ginther*[4] hearing that defendant's proposed fire expert could not rule out arson and the prosecution made an offer of proof that its fire expert would have testified that Hager's methodology and conclusions were sound and reliable. Furthermore, there

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based on defendant's relevant discharge date being within the requisite 10 year period.

[3] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

existed substantial circumstantial evidence against defendant. In light of the totality of the evidence against him, defendant fails to establish outcome-determinative error.

Moreover, counsel's reasons for not obtaining an expert witness to testify for the defense were reasonable. Mindful that the burden of proof was on the prosecution, defense counsel did not deem it necessary to call an expert to testify because the scientific evidence contradicted Hager's conclusions. Counsel was concerned that the presentation of competing experts would serve only to cloud the record and confuse the jury. Based on her experience that juries typically tend to side with the prosecution's expert when competing experts are presented, defense counsel feared the use of an expert would only serve to undermine the defense's theory and credibility. As a result, counsel's decision constituted trial strategy, which we will not second-guess. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

Defendant next argues that counsel was ineffective for referencing facts not in evidence during closing argument. The challenged portion of defense counsel's closing argument is as follows:

> At that point in time when he [Hager] is using that kind of data [information he received from Wilkinson regarding her belief that defendant set the fire], personal animosity or personal dislike of a person who was in the house some time [sic] during that day, and from that point there forward, the inspector, the fire marshal, looked for reasons to convict him.
>
> *Oh, it couldn't have been a fire – an accidental crack rock that fell in the couch. Oh, it couldn't have been a cigarette that fell in the couch and smoldered and then caught on fire.* They say that he says that's a point of origin, that couch. [Emphasis added.]

Wilkinson testified that she and defendant were smokers and there was smoking paraphernalia throughout the apartment. Wilkinson also testified that defendant had been using drugs in the days leading up to the fire. Defense counsel's closing argument referenced this testimony in an attempt to portray the fire as an accidental occurrence rather than purposeful malfeasance. As a result, counsel's remarks do not constitute ineffective assistance.

Finally, because we have determined that the trial court's scoring of PRV 1 was correct, counsel was not ineffective for failing to object to the scoring of this variable. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Stephen L. Borrello